

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL KYREE KING,

Defendant-Appellant.

UNPUBLISHED

April 17, 2007

No. 267296

Oakland Circuit Court

LC No. 2004-199510-FH

Before: Donofrio, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b), and the trial court sentenced defendant to concurrent prison terms of 85 months to 15 years for each count. Defendant appeals as of right. We affirm.

The twenty-seven year old defendant began dating the sixteen-year-old victim's mother's cousin in July 2004. He spent a lot of time at the victim's house, eating dinner or spending the night nearly every day. Defendant developed a close relationship with the victim and her siblings. He allowed the victim to drive his new car even though she did not have a driver's license. On September 14, 2004, the victim came home early from school, driving defendant's car. According to her mother, the victim looked "traumatized." The victim was crying, "her clothes wasn't [sic] on her right," and the button was missing from her jeans." The victim told her mother "Jamal did something to her." The victim's mother drove her to the police station, where the victim reported that defendant picked her up at school that morning, drove her to his house, and sexually assaulted her.

Defendant went to the police station voluntarily after learning that the victim reported the sexual assault to the police. Defendant admitted that he picked up the victim at school on September 14, 2004, but denied having any sexual contact with her. Defendant later admitted that he performed oral sex on the victim. On March 24, 2005, defendant admitted to the police that he had sexual intercourse with the victim, but asserted that it was consensual. Defendant testified at trial that the sexual acts were consensual.

Defendant first contends that the prosecutor failed to present sufficient evidence to support his convictions. In reviewing a challenge to the sufficiency of the evidence, we must view the evidence in light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the prosecution proved all the essential elements of the crime beyond

a reasonable doubt. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). We must draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). ““Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”” *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To sustain a conviction under MCL 750.520d(1)(b), the prosecution must prove beyond a reasonable doubt (1) that defendant engaged in sexual penetration and (2) that force or coercion was used to accomplish the sexual penetration. For purposes of subsection 520d(1)(b), force or coercion includes, but is not limited to, the actual application of physical force or violence or the threat of physical force or violence. See MCL 750.520b(1)(f). The force need not be so great as to overcome the victim. *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002). “Rather, the prohibited ‘force’ encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim’s wishes.” *Id.*

Any penetration, no matter how slight, is sufficient to satisfy the “penetration” element of third-degree CSC. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993). Here, the victim testified that defendant performed oral sex on her and that he penetrated her vagina with his penis. Her testimony was sufficient evidence from which a jury could infer that two instances of sexual penetration occurred in this case. See *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995); *People v Robideau*, 94 Mich App 663, 674; 289 NW2d 846 (1980).

Further, the evidence supported the conclusion that defendant used physical force to accomplish the sexual penetration. The victim testified that defendant grabbed her arm, that she was unable to pull away, and that defendant pulled her into a basement. She also testified that she was crying and that she told defendant to stop, but that he failed to comply. Additionally, the acts of penetration occurred in a basement where, arguably, the victim was isolated from help. Viewed in the light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find that defendant used force or coercion to accomplish the sexual penetration. See *People v Kline*, 197 Mich App 165, 167; 494 NW2d 756 (1992); *People v Makela*, 147 Mich App 674, 682; 383 NW2d 270 (1985). Contrary to defendant’s argument, the prosecutor was not required to present any physical, medical, or scientific evidence to corroborate the victim’s testimony because “[a] complainant’s eyewitness testimony, if believed by the trier of fact, is sufficient evidence to convict.” *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976).

Defendant next contends that his conviction was obtained on false and perjured testimony and that the prosecutor’s failure to correct the victim’s false testimony deprived him of due process. *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986). Here, however, defendant has failed to establish that the prosecutor allowed the victim to perjure herself at trial. Although defendant’s testimony contradicted the victim’s testimony, defendant has failed to present any evidence to conclusively establish that the victim lied when she testified at trial. We are not persuaded that the victim’s testimony was inherently incredible. Thus, defendant has failed to establish that the prosecutor knowingly used false testimony to obtain the convictions in this case. Cf. *Wiese, supra*. Moreover, “defendant cites no authority for the proposition that the prosecution must disbelieve its own witness when testimony from another witness contradicts her.” *People v Lester*, 232 Mich App 262, 278; 591 NW2d 267 (1998). The credibility of the witnesses’ testimony was for the jury to decide. *People v Clark*, 312 Mich 665, 673; 20 NW2d

765 (1945). In this case, the victim's testimony was sufficient to establish all the elements of the offenses of which defendant was convicted.

Defendant contends that his Sixth Amendment right to confront the witnesses against him was violated because he was not afforded the opportunity to cross-examine one of the nurses who examined the victim after the incident. This contention is based upon the admission of a medical report containing the non-testifying nurse's handwritten notes. But it was defense counsel who moved to admit the report, over the prosecutor's objection. Defendant cannot seek redress in this Court based on a position that is contrary to the position that he took in the trial court. "A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id.* See also *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) ("error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence").

Defendant also contends that he was denied his right to a fair trial because the trial court gave a coercive instruction to the jury when it was unable to reach a verdict. Defendant failed to object to the trial court's instruction before the jury resumed deliberations. Thus any error was waived. *People v Pollick*, 448 Mich 376, 387-388; 531 NW2d 159 (1995); *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984). See also MCR 2.516(C).

Nevertheless, we reject defendant's interpretation of the trial court's supplemental instruction to the jury. The instruction was not a substantial departure from the American Bar Association standard jury instruction 5.4, which our Supreme Court adopted in *People v Sullivan*, 392 Mich 324, 341-342; 220 NW2d 441 (1974).¹ The trial court instructed the jurors to carefully and seriously consider the views of their fellow jurors, and not to give up their honest beliefs about the weight of the evidence because of their fellow jurors or "only for the sake of reaching an agreement." The court further instructed the jurors that it was their duty to decide the case "if [they] could conscientiously do so without violating or surrendering [their] conscientious beliefs." Contrary to defendant's argument, the instruction did not coerce, encourage, or compel the jury to render a verdict and, therefore, did not constitute error warranting reversal. *Hardin, supra* at 316-317; *People v Bookout*, 111 Mich App 399, 402-404; 314 NW2d 637 (1981).

Finally, defendant contends that he is innocent and, therefore, his sentence violates the constitutional prohibitions against cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. This argument is without merit as the evidence was sufficient to support defendant's convictions. Moreover, because defendant's sentence fell within the sentencing guidelines range, his argument is without merit. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004), *aff'd* 475 Mich 140 (2006).

¹ The ABA's model instruction adopted in *Sullivan* is now incorporated in CJ12d 3.11.

Affirmed.

/s/ Pat M. Donofrio
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey